

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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KEVIN LINDKE,)
Petitioner,)
v.) No. 22-611
JAMES R. FREED,)
Respondent.)
- - - - -

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11 Tuesday, October 31, 2023

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:47 a.m.
16
17 APPEARANCES:
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19 the Petitioner.
20 VICTORIA R. FERRES, ESQUIRE, Port Huron, Michigan; on
21 behalf of the Respondent.
22 MASHA G. HANSFORD, Assistant to the Solicitor General,
23 Department of Justice, Washington, D.C.; for the
24 United States, as amicus curiae, supporting the
25 Respondent.

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1 P R O C E E D I N G S

2 (11:47 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 22-611, Lindke versus
5 Freed.

6 Mr. Kedem.

7 ORAL ARGUMENT OF ALLON KEDEM

8 ON BEHALF OF THE PETITIONER

9 MR. KEDEM: Mr. Chief Justice, and may
10 it please the Court:

11 The dialogue between public officials
12 and their constituents is fundamental to our
13 democracy. Much of that conversation now takes
14 place online, with social media platforms
15 serving as the new town square, where public
16 officials provide important information about
17 what they're doing on the public's behalf and
18 soliciting comments in return. While public
19 officials retain First Amendment rights, use of
20 a private social media account does not immunize
21 an official's conduct from First Amendment or
22 constitutional scrutiny.

23 Under our test for state action, a
24 public official who creates a channel for
25 communicating with constituents about in-office

1 conduct and then blocks a user from that channel
2 must abide by the Constitution. This test,
3 which focuses on how the public official is
4 using and purporting to use that account, is
5 consistent with this Court's precedent under
6 which a public official who purports to act in
7 that capacity is a state actor. It also accords
8 with Section 1983 and the original understanding
9 of what it means to act under color of law.

10 The Sixth Circuit's duty and authority
11 test, by contrast, would provide ready means for
12 public officials to evade the Constitution.
13 Here, for instance, it would mean that the city
14 manager would be free to block from his Facebook
15 page any constituent who is a member of a
16 disfavored race, religion, or political group,
17 free from constitutional constraint.

18 Our test avoids that result while
19 still leaving ample room for public officials to
20 communicate in their personal capacities.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Would you also win
23 under the doing your -- doing their jobs test?

24 MR. KEDEM: Yes, we absolutely would,
25 in part because, as has been pointed out, part

1 of the job of any high-ranking executive
2 official -- and the city manager is essentially
3 just under the mayor in terms of being high up
4 in city government -- part of that job is
5 telling people about what you're doing.

6 And what Mr. Freed was doing with his
7 Facebook account, sometimes multiple times a
8 day, was informing the citizens about what he,
9 as city manager, in his role as city manager,
10 was doing for the town and then communicating
11 directly with constituents about that, sometimes
12 answering their questions about the scope of his
13 orders.

14 JUSTICE THOMAS: But Ms. Karlan made
15 the point that there were only three instances
16 on the website there in the last case that were
17 personal. In this case, just going through the
18 Joint Appendix, there's quite a bit that is
19 personal.

20 So how would you just factually
21 distinguish that or emphasize the fact that --

22 MR. KEDEM: Sure.

23 JUSTICE THOMAS: -- the personal here
24 does not override the official?

25 MR. KEDEM: So there were certainly a

1 lot more personal posts, although the ratio of
2 job-related posts to personal posts changed
3 dramatically at the start of the pandemic, as
4 you would expect, because a lot of the services
5 and the way that he was doing his job migrated
6 online.

7 I think, once you've established a
8 channel for communicating with constituents
9 about your job, I don't think also posting
10 sometimes about your family is going to undo
11 that, although, if what you're complaining about
12 in a specific case is being -- is having a
13 comment on a personal post deleted, obviously,
14 that would change the equation.

15 JUSTICE JACKSON: Does it matter if
16 you've established this channel ahead of time
17 and before you became a public official? I
18 mean, you sort of suggested that it had to do
19 with the purpose of the --

20 MR. KEDEM: Yeah.

21 JUSTICE JACKSON: -- account.

22 MR. KEDEM: So I think you would look
23 at what you were doing with the page beforehand
24 or you could, I suppose, but I think it's fairly
25 clear that Mr. Freed wasn't talking about the

1 job of the city manager before he actually
2 became city manager. He wasn't posting about
3 directives that he himself issued until --

4 JUSTICE JACKSON: Right, but I guess
5 --

6 MR. KEDEM: -- he had that power.

7 JUSTICE JACKSON: -- I'm asking, does
8 it matter whether or not he opens up a new page
9 once he becomes the city manager and begins
10 conversing in the way that --

11 MR. KEDEM: Yeah.

12 JUSTICE JACKSON: -- we're talking
13 about or, alternatively, he had this page before
14 he became city manager, it had all of his
15 personal information and, you know, pictures of
16 his kids and whatnot, and he just added to the
17 stream of conversation?

18 MR. KEDEM: So I think that's
19 something that you would look at. Obviously, it
20 would be a factor, but there were a lot of
21 things that changed when he became city manager,
22 not just the content of the posts, but,
23 presumably, he also didn't list as his website
24 on the -- the page this official city address.
25 He didn't use the community comments at

1 PortHuron.org as his email address. There were
2 a number of things that changed by virtue of the
3 fact that he was starting to use this in his
4 capacity as the -- the city manager of the town.

5 JUSTICE JACKSON: Would it have
6 mattered to you if he had a disclaimer on it?

7 MR. KEDEM: So I think it probably
8 wouldn't get you back over the line into
9 personal use, in part because of the way that he
10 was using it to make certain announcements and
11 issue directives, information that you wouldn't
12 necessarily be able to get anywhere else. And,
13 certainly, there was no other place that you
14 could go to interact with the city manager.

15 Now it would have, I think, been
16 something that they could argue, that he was
17 doing -- using this in a personal capacity, but
18 I think the disclaimer would have been
19 substantially overridden by the way he was
20 actually using the page.

21 JUSTICE ALITO: Just to be clear, if
22 the page had not been created until he became
23 city manager, would the case come out the same
24 way? Should it come out the same way in your
25 view?

1 MR. KEDEM: It would, although perhaps
2 it would be even clearer than it already is.

3 JUSTICE ALITO: It would be -- okay.
4 What if 95 percent of the posts are personal and
5 5 percent of the posts involve discussion of his
6 work?

7 MR. KEDEM: So it would obviously be a
8 more difficult argument for us to make, but I
9 would still be here certainly as my client's
10 attorney telling you, look, if there's only one
11 place to go to interact with the city manager
12 about issues -- directives that he himself had
13 issued, the fact that he posts a lot about cats
14 or whatever personal thing he wants to post
15 about, that doesn't change the fact that if you
16 get blocked off from that page, you're suddenly
17 losing access to a lot of information.

18 JUSTICE ALITO: So, if it's entirely
19 personal, but once he slips and he talks about
20 his work, that -- that changes it?

21 MR. KEDEM: I think it does because,
22 there, it's not really being established as a
23 channel of communication. It's a little bit
24 like running into someone at the grocery store,
25 where maybe they let slip some information about

1 the way the government is working. That doesn't
2 mean that they are going to the grocery store in
3 order to interact with constituents.

4 But you could, obviously, change the
5 hypothetical where they say, I'm going to hold
6 office hours every Friday in the grocery store
7 for an hour to talk with citizens about, you
8 know, pending legislation and what I'm intending
9 to do. It --

10 JUSTICE ALITO: So I'm not sure about
11 -- the -- the line that you're drawing. You
12 said, if it's 5 percent official, 5 percent
13 work-related, then it's state action, but if
14 it's like 1 percent, one-half of 1 percent, it's
15 not? Is that what you're saying?

16 MR. KEDEM: So it's not a quantitative
17 test. It's qualitative. But the quality that
18 you're going for is whether you've established
19 it as a channel of communication. And I thought
20 I understood your hypothetical as essentially
21 just one thing you said one time, there's no
22 understanding or expectation that you're using
23 this as an ongoing channel of communicating --

24 JUSTICE GORSUCH: Counsel --

25 MR. KEDEM: -- with constituents.

1 JUSTICE GORSUCH: -- I'm confused.
2 Is -- is it the channel that we're supposed to
3 be focusing on -- this gets back to the Chief
4 Justice's first question in the last argument --
5 or is it the message at issue itself?

6 Because I had thought I heard you say,
7 if the message were about a private family
8 matter and you were blocked from that, you
9 wouldn't have any recourse. So which is it? Is
10 it the channel, or is it the message?

11 MR. KEDEM: So I think, in part, it
12 depends on what function you're complaining
13 about. If your complaint is you're being
14 blocked from access to the page, then it's the
15 channel that matters. It's the entire page and
16 your access to information.

17 If, on the other hand, you're
18 complaining because your comment was deleted
19 from a post, it obviously matters what the post
20 was about. If it was a post about cats, then
21 you don't have any constitutional claim.

22 JUSTICE GORSUCH: What if -- what if
23 the individual harasses the public official on
24 all of his personal, you know, cat pictures and
25 children pictures, and he finally gets fed up

1 and he just blocks them --

2 MR. KEDEM: Yeah. So I think --

3 JUSTICE GORSUCH: -- from the channel.

4 MR. KEDEM: Sure.

5 JUSTICE GORSUCH: Then that's state

6 action?

7 MR. KEDEM: So I think it could be in

8 the exact same way that it could be if, for

9 instance, you were on an official page of the

10 town and you were being harassing. At some

11 point --

12 JUSTICE GORSUCH: No, no, all the

13 harassing in my hypothetical has to do with

14 cats.

15 MR. KEDEM: No, I understand.

16 JUSTICE GORSUCH: The commenter hates

17 --

18 MR. KEDEM: Sure.

19 JUSTICE GORSUCH: -- cats.

20 MR. KEDEM: Sure. And --

21 JUSTICE GORSUCH: And maybe he hates

22 your children too, I don't know.

23 (Laughter.)

24 JUSTICE GORSUCH: But -- but -- but,

25 you know --

1 MR. KEDEM: Yeah.

2 JUSTICE GORSUCH: -- if I block that
3 person for that, at some point, you know, even
4 though it's all my personal stuff, that's state
5 action?

6 MR. KEDEM: So I think, again, let's
7 say, you know, in -- in official town pages, all
8 the time they say: Here's someone enjoying
9 themselves in the park, and let's say you posted
10 something --

11 JUSTICE GORSUCH: No, no, I'm talking
12 about my -- I -- I understand --

13 MR. KEDEM: I understand, Your Honor.

14 JUSTICE GORSUCH: -- you want to
15 change the hypothetical. I get it.

16 MR. KEDEM: Yeah.

17 JUSTICE GORSUCH: I get it. But just
18 answer mine if you would.

19 MR. KEDEM: Sure. So -- so the answer
20 is there still would be state action, but it
21 would probably easily pass the First Amendment,
22 and especially with the qualified immunity
23 overlay, it would be a very easy case. They
24 would come into a problem.

25 JUSTICE KAVANAUGH: Yeah, but there's

1 litigation -- I don't want to interrupt.

2 JUSTICE GORSUCH: No, no, please,
3 please interrupt.

4 JUSTICE KAVANAUGH: You know, once
5 it's state action, then -- then there's an
6 issue. And I guess one of the concerns I have
7 about your position and just the line-drawing is
8 to define doing your job as talking about your
9 job is really quite all-encompassing, really,
10 because a lot of elected officials I've been
11 around love going to the grocery store and
12 talking to people after church, and that's where
13 they learn things to help them do their job
14 better.

15 And they're thinking in their mind,
16 yeah, I'm going to church, I'm going to the
17 grocery, but I'm also going to pick up things --

18 MR. KEDEM: Yes.

19 JUSTICE KAVANAUGH: -- or going to the
20 game or going to the high school football game
21 on Friday night, I'm going to see a lot of
22 people, and that's going to help me get my
23 finger on the pulse of the community about, you
24 know, whatever issue it might be.

25 MR. KEDEM: And I -- I understand

1 that, but I think that's what the distinction
2 between talking about your job, which you might
3 do at the grocery store, and establishing a
4 communication with constituents about your
5 in-office conduct, which is something that
6 happens on an ongoing basis.

7 JUSTICE KAVANAUGH: So the two key
8 words I think you used there were "establishing"
9 and "channel." And I don't know what it takes
10 to "in the brick-and-mortar world" to establish
11 a channel.

12 But, if you have a regular pattern of
13 seeing a group of people, let's meet -- I want
14 to meet at my house with old friends regularly
15 to talk about what they think's going on --

16 MR. KEDEM: So I think --

17 JUSTICE KAVANAUGH: -- in the
18 community for purposes of helping me figure out
19 what legislation to propose --

20 MR. KEDEM: So --

21 JUSTICE KAVANAUGH: -- as a state rep,
22 say.

23 MR. KEDEM: -- I think -- I think
24 there, if you were just issuing an invitation to
25 your friends, that's very different than issuing

1 a general invitation to everyone in the town,
2 all your constituents who you basically say, I
3 will interact with anyone who comes, but,
4 according to my friends from the other side, you
5 could essentially say, but only the white
6 citizens of the town are invited.

7 JUSTICE KAVANAUGH: Right. But it
8 goes back to who you want to include and who you
9 want to exclude, I guess. And I think elected
10 officials and appointed officials rely on groups
11 of people who are supporters, friends, people
12 they've known, people that are fair-minded, not
13 people that are just going to come and scream at
14 them --

15 MR. KEDEM: Yeah.

16 JUSTICE KAVANAUGH: -- to get advice,
17 thoughts, including negative and critical
18 thoughts, but they want to exclude, you know,
19 the person who's the jerk who's going to
20 interrupt the whole thing.

21 MR. KEDEM: So I -- I think it's easy
22 sort of on the extremes where either you're just
23 inviting an old friend or you're inviting
24 everyone in the town because they're
25 constituents, which is essentially what Freed

1 was doing.

2 In the middle, I grant you there will
3 be difficult cases where it sort of seems like
4 you are inviting everyone only that you like or,
5 you know, there may be other ways to divide the
6 hypothetical.

7 But I think, in a case like Facebook,
8 where, essentially, anyone with a profile
9 could -- could look at Mr. Freed's page, I think
10 it's -- it's relatively clear the invitation was
11 to everyone in the town.

12 JUSTICE JACKSON: Can I direct your
13 attention to what I perceive to be a difference
14 between your position and the one that Ms.
15 Karlan just articulated? And maybe there is no
16 daylight, but I would -- be helpful to
17 understand if there is.

18 You've said repeatedly here that this
19 is about whether or not the page has been
20 established as a channel of communication, which
21 sounds to me like a species of the appearance.
22 We're looking at this page and we're seeing how
23 it operates.

24 I understood Ms. Karlan to be saying:
25 Well, really, her test is, are you doing your

1 job? What are the duties and functions of your
2 position? And have you created this page and
3 does it operate to facilitate your job duties?

4 Are you at all -- so is there a
5 difference between those two? And are you also
6 relying at all on the sort of duties or
7 functions whether or not the person had to
8 create the page or something like this?

9 MR. KEDEM: So I think, if they had to
10 create the page, that obviously is game over.
11 But we agree with the Respondents in the prior
12 case that there has to be a broader conception
13 of what duty encompasses to mean everything that
14 is sort of customarily expected of you in your
15 job for a high-ranking executive official.
16 Usually, that's going to be talking about your
17 job at least in certain established ways.

18 JUSTICE JACKSON: But I didn't hear
19 your test to be about duty at all really.

20 MR. KEDEM: Yeah. So --

21 JUSTICE JACKSON: Is it?

22 MR. KEDEM: So I think the answer is
23 it is certainly sufficient if you have a concept
24 of doing your job through your page. We think
25 that we have that here.

1 We also have a slightly broader
2 principle that if you hold yourself out as doing
3 your job through your page, that is also
4 sufficient, which I don't know that my friends
5 on the other side -- on -- Respondent in the
6 first -- first case disagrees with, but they
7 aren't relying as much on that principle.

8 JUSTICE JACKSON: And you hold
9 yourself out in the situation is because we can
10 look at the page and we see that it has been
11 established as a channel for communication with
12 the constituents?

13 MR. KEDEM: Yeah. So it's partly the
14 way that you design your page and partly what
15 you do with it. Here, we have both his profile
16 and the way that he was posting and what he was
17 posting about.

18 JUSTICE KAGAN: I -- I would have
19 thought that the "what it looks like" is the
20 worst test for you, because what this looks like
21 is there are a lot of baby pictures and dog
22 pictures and obviously personal stuff.

23 And intermixed with that, there is, as
24 you say, communication with constituents about
25 important matters. But it's hard to look at

1 this page as a whole, unlike the one in the last
2 case, and not think that surely this could not
3 be the official communication channel.

4 MR. KEDEM: So --

5 JUSTICE KAGAN: Or what, you know --

6 MR. KEDEM: Yeah. So I think --

7 JUSTICE KAGAN: It's not like any town
8 I've ever seen.

9 (Laughter.)

10 MR. KEDEM: Right. Well, I think
11 small-town government works in different ways.
12 Obviously, there was some personal stuff as
13 well. But the way that he was talking about the
14 posts, referring to things in the plural, the
15 way that he was posting things that were
16 directives that he himself had issued only
17 minutes earlier and then answering constituent
18 questions about that, now, admittedly, he was
19 also talking about personal things, but you
20 can't essentially immunize yourself from
21 constitutional scrutiny if you've established
22 this government channel of communication --

23 JUSTICE GORSUCH: What do you --

24 MR. KEDEM: -- just by also posting
25 about your dog.

1 JUSTICE GORSUCH: Well, what do you --
 2 what do you say to the Chief Justice's concern
 3 at the outset of this conversation about the
 4 free speech rights of civil servants? And we
 5 number in the millions now across this country.

6 And if -- if it is within the scope of
 7 your duty, you know, and if you're going to
 8 define that very, very broadly, you give the
 9 government a lot of power over limiting what --
 10 what many millions of Americans can say. And,
 11 surely, that must -- must be some concern to
 12 you.

13 MR. KEDEM: It is a concern that has
 14 to be balanced against the right of people in
 15 the town. I think there is some irony that the
 16 petitioners in the first case and the United
 17 States say the way to solve the First Amendment
 18 problem is for the government just to tell
 19 people how to use their pages and have --

20 JUSTICE GORSUCH: Well, and -- and --
 21 and there's some irony on the other side to say
 22 the way to solve the First Amendment problem is
 23 to turn it all into government speech, so the
 24 government controls what millions of civil
 25 servants in -- in towns large, small, and the

1 federal government alike, what they can and
2 cannot say in the public forum.

3 MR. KEDEM: So, admittedly, there is
4 going to be some issue of government control,
5 but I don't think that's escapable. For
6 instance, if the mayor of Port Huron had wanted
7 to, she obviously could have told Mr. Freed
8 either stop posting your directives to your
9 personal page, or when you post them, also post
10 this additional information, or, when you answer
11 a question about this directive, answer it in
12 this way.

13 So that sort of control is already
14 going to be there regardless of whether he's
15 considered a state actor.

16 JUSTICE GORSUCH: It would be on a --
17 on a clearly public page.

18 MR. KEDEM: As it is, yes.

19 JUSTICE GORSUCH: The question --
20 clearly. The question is whether it might also
21 have to be on a page maintained, somebody
22 thought personally that they came up with before
23 they became a government official that's mostly
24 populated by dog pictures and whether the
25 government can also mandate what the person can

1 say there.

2 And if that's the case, what's left of
3 that person's free speech rights?

4 MR. KEDEM: So I think --

5 JUSTICE GORSUCH: I mean, we used to
6 care about public employee private speech
7 rights, Garcetti, Pickering, you know.

8 MR. KEDEM: Yeah. And I think, as
9 your question alludes to, there is a doctrine
10 under the First Amendment that reconciles the
11 First Amendment rights of a public official
12 against the government's interests in the
13 speech.

14 One of the key points that we're
15 making is the exact same factors that you look
16 to to decide whether the government has an
17 interest in the speech and therefore has some
18 control over it, even when it's ostensibly
19 private speech, those are things like are you
20 purporting to do your job on the page? Are you
21 holding yourself out as a public official? And,
22 if so, can the government tell you, if you're
23 going to use your title on your page, as many
24 people do, just make clear you're saying this in
25 your private capacity.

1 And if the government can say that to
2 you consistent with the First Amendment, then
3 you sort of understand that there's not going to
4 be a different First Amendment equation just
5 because we're calling it state action as well.

6 CHIEF JUSTICE ROBERTS: Well, I mean,
7 these -- on these pages, people -- people have
8 both a job in the government and they have all
9 sorts of other things, whether it's cats or
10 children or whatever it is, and the problem it
11 seems to me is we kind of have to disaggregate
12 that, right, and say, well, you know, you have
13 to have a governmental page and you have to have
14 a private page and you can't mention the
15 government on your private page or else it's
16 going to become a government page.

17 And as I understand it, you basically
18 say, if you've got 5 percent government, then
19 we, the government, can basically say the whole
20 thing, even if the rest of it is all about your
21 children and -- and -- and the dogs, that's
22 ours. And if we don't like little dogs, we can
23 say you can't put pictures of little dogs on
24 there.

25 And it seems to me that -- that that

1 effort to kind of disentangle the two things
2 doesn't really reflect the reality of how social
3 media works.

4 MR. KEDEM: So, Your Honor, I have to
5 push back in two respects. First --

6 CHIEF JUSTICE ROBERTS: About the dogs
7 or --

8 (Laughter.)

9 MR. KEDEM: A little bit about the
10 dogs. So one principle is it's not the
11 5 percent versus 95 percent, that you've gotten
12 over some threshold. It's the way you're using
13 your page as an ongoing place where people in
14 the town go to get information about what you as
15 a city manager are doing, how you're doing your
16 job, the directives that you issue.

17 If you set it up that way, that's the
18 quality that you're looking for --

19 CHIEF JUSTICE ROBERTS: Well, just to
20 --

21 MR. KEDEM: -- not quantity.

22 CHIEF JUSTICE ROBERTS: I don't mean
23 -- well, I do mean to interrupt.

24 MR. KEDEM: Yes.

25 CHIEF JUSTICE ROBERTS: But -- but

1 what if you're doing -- you know that from your
2 -- you know, the official weather, whatever, a
3 very bad storm is coming. You also know that
4 not everybody checks the city's site, you know,
5 12 times a day, but you know a lot of people
6 look at your -- your private site. And if you
7 put on there there's a very bad storm coming or
8 I looked at the city weather, whatever, you need
9 to know there's a bad storm coming, does that
10 compromise the private nature of your page?

11 MR. KEDEM: No. Again, you haven't
12 set up an ongoing channel for communication
13 where people know that's the place to go in the
14 future for important information.

15 JUSTICE JACKSON: Well, why --

16 MR. KEDEM: And the second --

17 JUSTICE KAGAN: And how do you know
18 that this is an ongoing channel of
19 communication? What do you look to to decide
20 that? And -- and be specific about this site.

21 MR. KEDEM: Sure.

22 JUSTICE KAGAN: What on this site
23 indicates that this was what you consider an
24 ongoing channel of communication, as opposed to
25 just a place where you talk about your dogs, you

1 talk about your children --

2 MR. KEDEM: Yeah.

3 JUSTICE KAGAN: -- and you talk about
4 your work?

5 MR. KEDEM: Sure. So I think, as soon
6 as the pandemic started, there were multiple
7 posts a day about what he and other people in
8 the government were doing. Usually, he was
9 going to post a daily COVID update from the,
10 basically, health equivalent of the CDC. He was
11 posting directives. So I could direct you, for
12 instance, to the directive on page 22 of the
13 Joint Appendix. There's another directive on
14 page 20 of the Joint Appendix. And then the
15 specific post that was the subject of the
16 dispute with my client, that was flanked by a
17 post about a community operations outreach
18 center on one side and a place to donate for
19 people who were struggling on the other side.

20 So there were just multiple posts a
21 day about this. And he was also interacting
22 with constituents. So one of the key features,
23 I think, that you would lose out on is, if you
24 go back to page 22 of the Joint Appendix, he
25 issues this order about cutting off water, and

1 he says basically effective immediately we're
2 not going to cut off water for 30 days because
3 of the pandemic. And then there's a question
4 from a constituent below who says, well, what
5 about people whose water is already cut off?
6 Are those going to be turned back on? And he
7 answers yes.

8 So there is essentially a real-time
9 gloss on his own directive. And it's possible
10 that the directive appeared somewhere else.
11 There's nothing in the record about that. But
12 it presumably came a little bit later, and if
13 you wanted to know what is the city manager,
14 who's essentially the chief executive officer
15 for the town, what is he doing, that's the place
16 to go. There was essentially no other game in
17 town for figuring it out if you were a citizen
18 of Port Huron.

19 JUSTICE BARRETT: Well, that makes it
20 pretty difficult for a public official or a city
21 manager to have any kind of private site because
22 he could have a private Facebook page populated
23 with pictures of his dog, pictures of his kids,
24 and one of his friends asks something about the
25 water shutoff, and he says, you know, yeah, the

1 water is going to be shut off, you know, et
2 cetera, or a storm's coming, whatever.

3 Has he then transformed what he
4 thought was his private Facebook page into
5 something that is state action and so he
6 arguably has to give everybody in the town
7 access to, when he might not want to give them,
8 you know, access to pictures of his kids? Or
9 does he have to tell his friend, sorry, I can't
10 answer that question here, head over to my
11 public Facebook page and I'll answer it there?

12 MR. KEDEM: So that sounds a lot to me
13 like the sort of Facebook equivalent of just
14 running into someone in the grocery store. I
15 don't think that that creates any sort of
16 channel that way, although the best practice is
17 obviously to refer someone -- you know, for more
18 information, go to the official page.

19 JUSTICE BARRETT: It creates
20 nightmares of litigation, though, right?

21 MR. KEDEM: So it -- it could create
22 nightmares of litigation. I think, literally,
23 whatever you say here, unless you essentially
24 say nothing that happens over Facebook is going
25 to ever be state action, which I don't even now

1 take any of the -- the parties to be arguing,
2 unless you say that, you're always going to have
3 some amount of litigation.

4 The good news is our test has been the
5 majority test in the circuits. And I think the
6 reason that you don't see a flood of litigation,
7 there are basically only five court of appeals
8 decisions, including the two cases before you,
9 is number one. You've got the qualified
10 immunity overlay, number two. Most of these
11 First Amendment claims are not going to have
12 much to them. They can be dismissed on
13 reasonable time, place, and manner restrictions.

14 JUSTICE KAVANAUGH: Why isn't all of
15 Facebook the equivalent of running into someone
16 at the grocery store, unless, on that personal
17 page, you're announcing some governmental rule
18 or some official notice --

19 MR. KEDEM: Yeah.

20 JUSTICE KAVANAUGH: -- of some kind?
21 And we can debate what official notice is.

22 MR. KEDEM: So I think Facebook, as
23 this Court has said in other cases, and all of
24 these social media platforms are incredibly
25 powerful in a way that running into someone in

1 the grocery store is not. This is not just an
2 incidental place where you happen to receive
3 speech from someone.

4 You know, in the olden days, if you
5 were a public official and you wanted to
6 communicate with the public outside of formal
7 channels, you probably would have had to walk
8 out of your office, maybe find a pay phone, if
9 you remember what those still were, and it would
10 have been very difficult without the use of your
11 staff to communicate to the public in any sort
12 of broad way.

13 These social media platforms make that
14 basically instantaneous. You can cast as wide a
15 net as you want, talk to everyone in the town.
16 You can talk specifically to individual people.
17 They are just incredibly powerful in a way that
18 I don't think that just the happenstance of
19 running into someone in the grocery store is.

20 I think the better analogy, if I may
21 tweak yours, is essentially just saying, you
22 know, I'm going to post my private phone number.
23 Everyone in the town can give me a call if you
24 have problems with your leaf collection. Oh,
25 but, by the way, only white citizens are allowed

1 to use this phone. I think that would also be
2 constitutionally problematic, even though you
3 were using your own private phone number.

4 CHIEF JUSTICE ROBERTS: Thank you.

5 Justice Thomas?

6 Justice Alito?

7 Justice Sotomayor?

8 Justice Kagan?

9 Justice Kavanaugh?

10 Justice Barrett?

11 JUSTICE BARRETT: No.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: Just one final
15 question. I guess I don't understand why this
16 test that you have articulated doesn't require
17 the sort of post-by-post analysis, because I
18 appreciate that you say that this is an ongoing
19 channel of communication because we have some
20 posts that give the kind of information and ask
21 for public feedback, but you also concede that
22 we have other posts, a substantial number of
23 other posts, that are private.

24 So, first, I guess, what is your
25 answer to could the public official who uses

1 this to communicate with the public sometimes,
2 could they block a person who made comments
3 about the dogs or not?

4 MR. KEDEM: So, certainly, they
5 could --

6 JUSTICE JACKSON: Is that state
7 action?

8 MR. KEDEM: Right.

9 JUSTICE JACKSON: Excuse me. Is it
10 state action --

11 MR. KEDEM: So --

12 JUSTICE JACKSON: -- to block a
13 comment about the dogs?

14 MR. KEDEM: So I think the answer is,
15 if you're talking just about removing a comment
16 from a specific post, it is only state action if
17 the post itself has something to do with the
18 job. And I think this goes back to the Chief
19 Justice's questions about whether all of a
20 sudden it means that you basically have to let
21 the government control all the postings that you
22 do about your cats or dogs.

23 JUSTICE JACKSON: Right.

24 MR. KEDEM: The answer is no because
25 the posting about the cats or dogs is not state

1 action. But, if you're talking about blocking
2 someone's access to the entire page for all time
3 on a going-forward basis, then, obviously, it
4 matters not just the specific post that led you
5 to take that action but all of the other
6 information that they're losing out on.

7 JUSTICE JACKSON: So you're saying
8 there is a situation -- was that the case in
9 your situation where the -- the block resulted
10 in no access to this page at all?

11 MR. KEDEM: Yes. So two things
12 happened. He had comments removed, but, also,
13 he was blocked so that he could not access the
14 page when he was signed in. And there were four
15 other people who also either had comments
16 deleted or were blocked, all of whom, because --
17 it was because they essentially criticized the
18 way that Mr. Freed was performing his job of
19 city manager.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Ms. Ferres.

24

25

1 ORAL ARGUMENT OF VICTORIA R. FERRES

2 ON BEHALF OF THE RESPONDENT

3 MS. FERRES: Mr. Chief Justice, and
4 may it please the Court:

5 This country's 21 million government
6 employees should have the right to talk publicly
7 about their jobs on personal social media
8 accounts like their private-sector counterparts.

9 As this Court addresses the question
10 presented, this Court should adopt the Sixth
11 Circuit's duty and authority or state official
12 test because it complies with this Court's
13 precedent and requires that a government
14 employee is either exercising power possessed by
15 virtue of state law or made possible only
16 because he is clothed with the authority of
17 state law.

18 Petitioner wrongly advocates for an
19 inherently subjective test that divorces the
20 state action inquiry from state law.
21 Petitioner's test will result in uncertainty and
22 self-censorship for this country's government
23 employees despite this Court repeatedly finding
24 that government employees do not lose their
25 rights merely by virtue of public employment.

1 James Freed's Facebook account is the
2 perfect example of the danger of Petitioner's
3 test. Mr. Freed opened a personal Facebook
4 count in -- account in 2008 as a college student
5 at Indiana Wesleyan University.

6 For 12 years, he built up the account
7 to interact with friends, family members, and
8 colleagues to talk about his passions and
9 interests, including his wife, daughter, his
10 dog, his work, and his favorite Bible passages.

11 As he had done for over a decade while
12 operating the account, in 2020, Mr. Freed made a
13 private choice like any other Facebook user
14 could do to block Petitioner and delete
15 Petitioner's comments from the page.

16 After being sued, Mr. Freed
17 deactivated the page and stopped speaking to his
18 family and friends and the public on Facebook
19 because he did not want to lose control over his
20 own speech by the threat of state action.

21 Such self-censorship for government
22 employees will not only have a negative impact
23 on society -- on government employees themselves
24 but as society -- in addition to society as a
25 whole as the voices that may advance knowledge

1 and the search for the truth will be silenced.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: There's quite a bit
4 on the site about personal activities, including
5 the battles with raccoons and other things, but
6 Petitioner says that the balance changes
7 somewhat during COVID, during the COVID crisis.

8 Would you react to that and whether or
9 not that sort of episode is enough to convert
10 this into a -- into an official activity on this
11 site as opposed to a personal site?

12 MS. FERRES: Yes, Justice Thomas. So,
13 when you look at the -- from the Joint Appendix
14 from 15 to 24, you can see that from the time
15 that COVID started in March of 2020 through the
16 day that the post in which Petitioner claims he
17 was then blocked and deleted, Mr. Freed only
18 makes 14 posts. And just to give some context
19 to that, from March 2019 to May of 2020, he made
20 451 posts. He was very clearly a very active
21 Facebook user.

22 And in those 14 posts --

23 JUSTICE THOMAS: Is that -- before you
24 go on -- before -- before you go on, the -- just
25 the COVID activity, though, is that -- would you

1 consider that government speech?

2 MS. FERRES: No, Your Honor. And he
3 had no duty or authority to be the COVID
4 spokesperson from the county. And when you
5 really look at those 14 posts, all he was doing
6 was resharing information from other sources.

7 And most often in only two instances
8 was it the City of Port Huron. There were other
9 nonprofit entities, there was other government
10 agencies that weren't the City of Port Huron.

11 He was sharing information just like
12 your neighbor might have done on Facebook, like
13 anyone else during COVID, so nothing changed
14 during that COVID time period.

15 JUSTICE SOTOMAYOR: How was he --
16 wasn't he inviting the public to comment on his
17 performance as a public official?

18 MS. FERRES: Your Honor, no, there
19 is -- there was a spot that people could
20 comment. And sometimes people did. And as my
21 friend on the other side noted, that he
22 sometimes would give the answer if he knew it,
23 but --

24 JUSTICE SOTOMAYOR: So you're claiming
25 that this site was, in fact, not a site for --

1 not an open square site where he was sharing
2 business/work information on a regular course --

3 MS. FERRES: He did --

4 JUSTICE SOTOMAYOR: -- or -- or
5 soliciting comments on a regular course?

6 MS. FERRES: No, Your Honor. And you
7 can see in the record that oftentimes someone
8 would ask a question related to the city and Mr.
9 Freed didn't respond. So, if he was having --
10 if he had the duty to answer the town's
11 constituents, which he's an employee --

12 JUSTICE SOTOMAYOR: So -- so now use
13 the -- the definition of duty and authority that
14 both the Solicitor General and the -- the other
15 case has done. Tell me how you fit in within
16 that broader definition.

17 I know how you fit in within the Sixth
18 Circuit. They ruled. Address the way they
19 defined it and tell me how you would get -- how
20 this case would come out under their broader
21 rule.

22 MS. FERRES: Sure, Your Honor.

23 JUSTICE SOTOMAYOR: Assuming its duty
24 includes duty to communicate with constituents,
25 that you have either custom or whatever, and

1 authority includes the authority to bind the
2 state in some way.

3 MS. FERRES: Your Honor --

4 JUSTICE SOTOMAYOR: Or -- or to do
5 this thing.

6 MS. FERRES: -- I'll start with the
7 Solicitor General's test because I think --

8 JUSTICE SOTOMAYOR: Okay.

9 MS. FERRES: -- that's the easiest.
10 We would very clearly win under that test
11 because this is a personal account. The log-in
12 is JamesRFreedl@facebook.com. So we --

13 JUSTICE SOTOMAYOR: But they went past
14 that and said it depends on the nature of the
15 message in some --

16 MS. FERRES: Your Honor --

17 JUSTICE SOTOMAYOR: Yeah.

18 MS. FERRES: -- I -- I don't -- I
19 don't -- don't think that the Solicitor General
20 --

21 JUSTICE SOTOMAYOR: Well, they said,
22 if you used the account for all that personal
23 stuff and used it for notice-and-comment on a
24 rule, that would be a business account.

25 MS. FERRES: Correct. If he -- if he

1 did --

2 JUSTICE SOTOMAYOR: So the message
3 there, you have to look both contextually or the
4 channel, and you have to look also at the
5 message.

6 MS. FERRES: Your Honor, I agree with
7 that. I -- I would say that if Mr. Freed used
8 the Facebook page, they decided to host a -- a
9 city council meeting in his -- on -- on Facebook
10 Live during the pandemic, then, during that
11 period of time, there may be state action in
12 that case.

13 And I think that's where the
14 notice-and-comment comes in, because the city
15 council meeting inherently has a right to access
16 to the public. They're able to come for public
17 comment.

18 But, if you looked at it, if they did
19 that in his backyard and he opened up his
20 backyard to the city council meeting, while
21 there may be state action during the city
22 council meeting, I don't think anyone would
23 dispute that, he doesn't have to let everybody
24 --

25 JUSTICE JACKSON: The government does.

1 The government in -- I understood the
2 government's position to be that if they had the
3 city council meeting in their backyard -- and
4 maybe I'm mistaken -- that it's a property
5 thing, it's -- if they have it on the farm or
6 whatever.

7 MS. FERRES: Your Honor, my
8 understanding of the Solicitor General's test is
9 that the property is heuristic and that if it's
10 personal in and of itself, then that's pretty
11 much always going to go to the government
12 employee, but I'll let the Solicitor General
13 also --

14 JUSTICE JACKSON: Okay.

15 MS. FERRES: -- answer for herself.

16 JUSTICE JACKSON: Sorry.

17 MS. FERRES: But -- that's okay.

18 I -- I think the hard -- the biggest
19 problem that we have in -- in this case is that
20 without this type of bright-line rule, we're not
21 going to give government employees -- we're not
22 looking to anything objective. We're looking to
23 Petitioners' subjective criteria.

24 There is going to be an influx in
25 litigation and government employees won't know

1 when or when they cannot -- when they can talk
2 about their jobs on social media, which we know
3 from Lane is their right to do.

4 CHIEF JUSTICE ROBERTS: Well --

5 JUSTICE KAVANAUGH: I think your --

6 CHIEF JUSTICE ROBERTS: -- I was just
7 going to say one clear rule would be, if it's
8 the only place they can go and you're talking
9 about governmental activities, that's the place
10 to go, that -- that -- that's government speech.

11 In other words, here, perhaps the
12 significant characteristic is that there wasn't
13 any other place to go, right?

14 MS. FERRES: Your Honor, there were
15 other places to go. Every -- Mr. Freed
16 very test -- very clearly testified -- and this
17 is at the Joint Appendix at 638 -- that he --
18 anything that was ever released was always
19 released by official channels.

20 So, for example, when he issued the
21 water directive, that would have been sent to
22 the water department, and, of course, when he
23 did that, there's state action there.

24 JUSTICE KAGAN: But what if many
25 people in this town thought that, you know, the

1 site that they wanted to go to was his site.
2 They didn't want to go to the water site and the
3 road site and the COVID site and the healthcare
4 site and the "this site" and the "that." I
5 mean, he was the one-stop shopping, and they
6 could see pictures of his dog too and that was
7 nice. So this is where they went for their
8 information about what was happening in town.

9 MS. FERRES: Well, rest in peace to
10 his dog, but, Your Honor, he -- in this case, he
11 -- it doesn't matter that someone wanted to go
12 see his site. There was -- he didn't -- his --
13 the city manager position is not a public-facing
14 position. It's not something like a press
15 secretary where they -- they are required to
16 speak to the public.

17 His duties under the -- under the
18 state law or the city ordinances are to manage
19 the government employees.

20 JUSTICE KAGAN: And you don't think
21 that managing the government -- managing
22 everything that goes on in the town, that it
23 helps to have a -- a channel of communication to
24 your constituents, to the people who live in the
25 town?

1 MS. FERRES: Your Honor, I think
2 that's -- that's obvious in any type of position
3 like that. Any governmental position would want
4 to have some type of communication with the
5 public. But that doesn't mean that every single
6 thing, every single time a government employee
7 talks about their job and they happen to be in
8 public, that it transforms into state action.

9 JUSTICE KAVANAUGH: Well, I think the
10 problem is they define the custom, I think, of
11 positions like this as including communicating
12 with the public about your job, and, therefore,
13 everything that you communicate about your job
14 becomes state action. So that's a problem for
15 them as I see it because that seems very broad
16 to me.

17 But then how would you define it short
18 of that? And be very specific. For example,
19 announcing rules, the word "directive" here,
20 announcing directives, announcing notices about
21 COVID, what -- like, where do you draw the line
22 short of the line that I think the other side
23 has?

24 MS. FERRES: Justice Kavanaugh, I
25 think that your hypotheticals in the last case

1 made the most sense and that when, if you have a
2 duty to announce a rule and the only time that
3 you ever do it is on the Facebook page, then
4 there's going to be state action there. If he
5 had an explicit duty to do something and that's
6 the only time he's carrying it out, yes.

7 But, if he's merely reposting or
8 re-sharing the official action that he had
9 already taken, there's no state action in that
10 case.

11 JUSTICE KAVANAUGH: And on the
12 re-sharing thing, I guess -- this is a helpful
13 question for you, but just to think it through,
14 I guess the point there is any citizen could be
15 re-sharing it, not -- not -- it's not unique to
16 the city manager, I suppose.

17 But I think the response to that, just
18 to continue it, as Justice Kagan would say, a
19 lot of people are going to rely -- her question
20 suggested, a lot of people are going to rely on
21 the city manager to be the place you go for that
22 information.

23 MS. FERRES: Your Honor, a couple
24 things in response to this. But just the clout
25 of someone's job doesn't transform something

1 into state action. So many more people may
2 attend Mr. Freed's birthday party because he is
3 the city manager, but just that clout of his job
4 alone and the fact that people may be going to
5 his Facebook page because he is the city manager
6 isn't enough to get us into state action.

7 JUSTICE KAVANAUGH: And one thing you
8 said I think I disagree with pretty strongly,
9 which is that it's not part of your duties to
10 communicate as a city manager with the public.
11 I would think, as a customary matter, that would
12 always be -- maybe you didn't say that, so I'll
13 give you an opportunity to amend that if you
14 want.

15 MS. FERRES: No, Your Honor. I think,
16 in all government positions, I think it's an
17 inherent -- talking to -- generally and
18 speaking, but the city manager's role I think is
19 unique in that he has no authority to take any
20 -- he can't make policy, he can't change policy.
21 He can only recommend what he thinks is best to
22 the city council, and then they have to take an
23 official action as the city body.

24 JUSTICE BARRETT: But I think --

25 MS. FERRES: He has --

1 JUSTICE BARRETT: Oh, sorry. Please
2 finish.

3 MS. FERRES: He has no authority in --
4 in and of himself to make any -- take any action
5 like that.

6 JUSTICE BARRETT: So Justice Sotomayor
7 was asking in the last argument about the Sixth
8 Circuit's test and whether it relied solely on
9 written law and excluded custom. But you've
10 been talking back and forth with Justice
11 Kavanaugh about custom and customary duties.

12 So do you agree that custom can be
13 part of the source of an -- of authority or
14 duty?

15 MS. FERRES: No, not exactly, Your
16 Honor, but I do think that there could be -- I
17 think the Sixth Circuit used the phrase
18 "apparent duty," so I -- I guess what I would
19 say is if the city council directed Mr. Freed to
20 main -- to discuss city business on a social
21 media account.

22 JUSTICE BARRETT: But 1983, I mean,
23 clearly, custom can be enough.

24 MS. FERRES: Correct.

25 JUSTICE BARRETT: Custom or policy, so

1 do you really want to fight that that hard?

2 MS. FERRES: I -- I don't disagree
3 that 1983 says statute, ordinance, regulation,
4 custom, or usage. So that -- we don't have to
5 look just to -- just to state law, but I think
6 the only case this Court has ever really
7 addressed with custom was Adickes, and it had to
8 be something that was so forceful that it
9 essentially was the law. So, when we look at
10 that case, they weren't letting any blacks into
11 the -- at the counter to eat, and it was --
12 there was a police officer in there enforcing
13 that custom.

14 So we don't have anything like that in
15 this case where it's something so defined that
16 it becomes essentially a duty.

17 JUSTICE JACKSON: Well, why -- I guess
18 -- I understand your argument to be with respect
19 to the need for some sort of clarity, bright
20 line, the public officials have a First
21 Amendment right and they need to know when
22 they're going to be able to exercise it. I
23 appreciate that.

24 But I guess I thought that we had a
25 line of cases like the Pickering and Garcetti

1 cases in which those kinds of issues were taken
2 into account and the Court did not choose a
3 bright-line test. In other words, in the
4 Pickering scenario, where the public employees
5 are trying to speak on matters of public concern
6 and the government doesn't want them to speak, I
7 suppose the Court could -- could have adopted
8 some sort of a bright line as to when -- when
9 are you speaking in your public capacity and
10 when are you not.

11 But we said that it's impractical
12 inquiry and that the listing of a given task in
13 the employee's written job description is
14 neither necessary nor sufficient to demonstrate
15 that conducting the task is within the scope of
16 the -- the professional duties.

17 So it seems to me like you are arguing
18 for a bright-line listing of the duty or some
19 kind of clear way to know in a circumstance in
20 which in other similar situations we've said
21 that's not required.

22 MS. FERRES: Your Honor, I don't think
23 it's only looking at the specific duty or that
24 bright line, but I think what -- what I mean
25 when I say the term "bright line" is that

1 there's some type of objective indicia of the
2 duty and authority and where the Sixth Circuit,
3 I think, was correct in saying that, you know,
4 you can look whether government employees are
5 helping the person maintain the page, if
6 government funds are used, if the government
7 page is owned by the government, if it -- once
8 -- in Mr. Freed's case, if once he leaves the
9 city manager position, if then the next city
10 manager is going to take over that account. So
11 these are all objective indicia of --

12 JUSTICE JACKSON: Would you include
13 operation, how it functions? The other side
14 says you also look at what's actually going on
15 on the page. Is that a part of the test for you
16 or not?

17 MS. FERRES: No, Your Honor, I
18 wouldn't include function in the way that they
19 -- they do. I -- I -- I would look to whether
20 there is duty and authority because that's what
21 this Court's precedent in state action has
22 required, that there -- you're exercising some
23 type of rights and responsibilities made
24 possible only because you have the authority of
25 state law.

1 JUSTICE SOTOMAYOR: That -- that seems
2 to me not adequate at all, but every elected
3 official tells me that they're on duty 24 hours
4 a day. And so, if they are during that 24 hours
5 creating themselves and posting the Facebook and
6 doing all of the communications they're doing,
7 why isn't that state action?

8 If you're using government resources,
9 you're a government resource. You're a
10 government employee. And if you're claiming
11 you're on duty 24 hours, then you are. And you
12 are using a state resource. So it can't be as
13 limited as you say.

14 MS. FERRES: Your Honor, that would
15 violate the government employee's First
16 Amendment rights because we know from Lane that
17 government employees have the right to speak
18 publicly about their jobs. Even in -- in Lane
19 --

20 JUSTICE SOTOMAYOR: So the question is
21 on what topics, and the issue becomes, as I
22 think your other side is arguing, are you using
23 this as a channel of communication with the
24 public for you to be able to do your job?
25 That's how they want to define it.

1 MS. FERRES: Yes, I'd agree with that,
2 Your Honor. That's how --

3 JUSTICE SOTOMAYOR: All right.

4 MS. FERRES: That's what they often --

5 JUSTICE SOTOMAYOR: That's what --
6 that's what they're saying --

7 MS. FERRES: Yes.

8 JUSTICE SOTOMAYOR: -- but I don't
9 know what's wrong with that if your position is
10 that the state stops you from using it as an
11 official page.

12 MS. FERRES: Well, then every time the
13 -- a government employees speaks about their job
14 they have the threat of litigation like this and
15 they have the threat of their --

16 JUSTICE SOTOMAYOR: Well, this --
17 these Facebook challenges to me are -- are not
18 quite made up, but I don't fully understand them
19 because no one forces a public employee to have
20 a comment box. And so I don't know why your
21 person closed down his Facebook account when he
22 could have just blocked public comments.

23 MS. FERRES: Your Honor, actually, at
24 the time, Facebook did not have that option. It
25 didn't come into effect until March of 2021, so

1 --

2 JUSTICE SOTOMAYOR: I see. Okay.

3 MS. FERRES: -- at the time, he -- he
4 did have to require comments on his page if he
5 wanted to continue speaking to his family and
6 friends on the page.

7 JUSTICE SOTOMAYOR: Got it.

8 MS. FERRES: That is different now,
9 and social media will evolve, so there will be
10 different -- different things that happen, but
11 that wasn't an option at the time.

12 JUSTICE ALITO: If you were advising a
13 -- a different town manager in a different town,
14 someone who's newly elected, this person loves
15 Facebook, wants to communicate with family and
16 friends on Facebook, also wants to communicate
17 with constituents, would you advise that person
18 to mix the two together on the same Facebook
19 page, or would you advise that person to
20 separate them and have a purely job-related
21 official page and a purely personal page?

22 MS. FERRES: I think, until this case
23 is decided, I might have different opinions on
24 what I would advise someone, but I -- I -- I do
25 believe that under the state action inquiry

1 here, a public employee should be able to speak
2 about their job as long as they're not taking
3 official action -- exercising their actual job
4 duties on the page or hosting a -- a city
5 council meeting or things like that. Just
6 speaking and reposting about your job should be
7 perfectly fine to do on either page, on one
8 page.

9 Unless the Court has any further
10 questions.

11 CHIEF JUSTICE ROBERTS: We'll find
12 out.

13 Justice Thomas?

14 Justice Alito?

15 Justice Sotomayor?

16 Justice Gorsuch?

17 Justice Kavanaugh?

18 Justice Barrett?

19 Justice Jackson?

20 Thank you, counsel.

21 MS. FERRES: Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Ms. Hansford?

23

24

25

1 ORAL ARGUMENT OF MASHA G. HANSFORD
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE RESPONDENT

4 MS. HANSFORD: Mr. Chief Justice and
5 may it please the Court:

6 As the government explained in the
7 first argument, the correct overarching task
8 here is duty or authority and we think how that
9 task plays out in a case like this one that's
10 about denial of access to property should look
11 closely to the nature of the property.

12 And so we're trying to get at whether
13 this is an exercise of state power and Justice
14 Barrett, we're happy to view this as evidence of
15 that, but we think that the heuristic or the way
16 the Court should look at this set of cases is
17 that state action generally exists in a denial
18 of access to property case, where either the
19 government controls the property such as an
20 official Facebook page or a defendant is
21 exercising a duty that itself requires providing
22 access, such as conducting a city council
23 meeting on Facebook Live, or Justice Jackson, in
24 his backyard, that's something that requires
25 providing access so that would be something

1 that's an exercise of state power.

2 By contrast, the appearance and
3 content test that my friend on the other side
4 advances imperils the freedom of a government
5 official to speak as a public citizen on matters
6 of public concern. And I think the facts here
7 are a perfect example.

8 Mr. Freed posted on Facebook on his
9 own time on a page he had created long before.
10 He didn't use any government devices. He didn't
11 use government resources. And still because,
12 like most people on Facebook, he was talking
13 about the pandemic in March of 2020. And
14 because that overlapped with the subject matter
15 of his job, my friend on the other side says
16 that that became state action such that
17 constitutional constraints applied, such that he
18 was required to allow comments he disagreed with
19 or people he found creepy.

20 And I think that that has a really
21 serious repercussions. I think both just in the
22 Facebook context specifically, I think as the
23 Chief Justice pointed out, that does mean
24 employer control.

25 The means the City of Port Huron could

1 say here, Mr. Freed, no Bible verses on your
2 page. He had Bible verses on his page, because
3 this is state action, that means it's our speech
4 and we don't want biblical verses on our pages.
5 That would be something the government could do
6 if this is state action and so it falls into the
7 Garcetti bucket instead of the Pickering bucket.

8 And I think it also has major
9 repercussions for the physical world because if
10 appearance and content can convert something
11 using purely private resources that has no
12 government ownership into state action, that
13 means that when Mr. Freed goes to the hardware
14 store and maybe he's wearing his city manager
15 pin and he's talking to people, those people
16 have access to the government in that instance
17 because he's knowledgeable about that material.

18 And that suggests that suddenly he
19 might be subject to constitutional constraints
20 or if he is having people over for a dinner
21 party, either friends or a kitchen cabinet of
22 informal advisors whose views he shares, if he
23 talks too much about his job, if he identifies
24 himself as a city manager or they know that
25 position, that means that he loses the ability

1 to have those conversations in his private
2 capacity.

3 And that's why we think it's so
4 important to look at what the actual duties of
5 the job were, that he was exercising and just
6 this idea that any time you're having a
7 conversation with the public, that becomes state
8 action, I think, is a really dangerous idea.

9 And to look specifically at what Mr.
10 Freed's duties were in this case, Justice
11 Kavanaugh, I think different city managers might
12 have different roles. But Mr. Freed's role,
13 which is set out in Section 2013 of the city
14 code and (c)(51) of the charter is really not a
15 public-facing role. He reports to the city
16 council. He issues administrative directives.
17 He manages other officials.

18 I think if you look at that set of
19 duties, it's clear that he's not the person
20 who's in charge of communicating to the public.
21 And I think that's another way that my friends
22 on the other side position on these facts is so
23 extreme.

24 JUSTICE ALITO: In the physical world,
25 practical limitations, severely limit the

1 ability of government officials to move what
2 look very much like government events or
3 functions onto private property. So your
4 property-based rule may make more sense in that
5 -- in that world, but it -- it doesn't cost
6 anything to open a Facebook page.

7 And so to make so much turn on who
8 owns the Facebook page seems quite artificial.
9 You know, if the mayor of a small town could
10 have everybody -- could have a -- what looks
11 like a quasi-public meeting on -- on the farm,
12 but somebody who -- an elected public official
13 in a jurisdiction with millions of people can't
14 do that.

15 MS. HANSFORD: So -- so Justice Alito,
16 I agree that if there is a duty to do a certain
17 thing, then the fact that it's happening on
18 private property, whether it's the farm or the
19 Facebook Live or the private Zoom isn't going to
20 change that.

21 The government official can't take
22 things away if they're carrying out a duty that
23 is going to still be state action.

24 But I think we have to be really
25 careful before assuming that something that's

1 happening on private property is state action
2 just because it's talking about the subject
3 matter, absent some duty to have that
4 conversation.

5 JUSTICE ALITO: Well, duty -- if duty
6 is positive law then that's a pretty clear and
7 sharp limitation. But if you say -- if you
8 agree that custom -- a duty can arise from
9 custom, do you agree with that?

10 MS. HANSFORD: I agree with that but
11 in the narrow sense, the Adickes sense of custom
12 that has the force of law, that's how this Court
13 has defined it in the 1983 context. So if there
14 is such a strong norm in a town that if you
15 allow your diner to serve racially diverse
16 groups like the facts in Adickes on segregated
17 groups, the sheriff will come and will -- will
18 beat you up and there will be negative
19 repercussions that -- I think that is the form
20 of custom. I don't --

21 JUSTICE ALITO: But communicating with
22 --

23 MS. HANSFORD: -- want to be too rigid
24 on how I define --

25 JUSTICE ALITO: I'm sorry.

1 Communicating with constituents is not a -- a
2 strong enough custom for elected public
3 officials?

4 MS. HANSFORD: So just -- Mr. Freed is
5 not an elected official. He's an appointed
6 official. But setting that aside, there are --
7 there are roles in which communicating with the
8 public is part of the job, but that is also
9 something that any public official can do as a
10 private citizen, and we have to tell which.

11 And if it's happening on private
12 property, we should be really careful in
13 assuming that that is the exercise of a public
14 duty because that takes away the public
15 official's ability to ever communicate with the
16 public or, on matters of public concern, say
17 things like "Stay Home, Stay Safe" and that
18 becomes official action even though you could
19 equally say that as a private citizen, so --

20 JUSTICE KAVANAUGH: I -- I didn't want
21 to interrupt. Sorry.

22 MS. HANSFORD: No, please go ahead.

23 JUSTICE KAVANAUGH: You were about to
24 say, I don't want to be rigid on how I define,
25 and then you didn't finish that. I just want to

1 make sure I caught that.

2 MS. HANSFORD: I think, on that --

3 JUSTICE KAVANAUGH: I think it was
4 custom, but --

5 MS. HANSFORD: I think on how I define
6 custom, so I think that duty has some
7 flexibility to it.

8 Here, you would look at those
9 provisions that I cited earlier in the city
10 code, and the city charter also provides --

11 JUSTICE KAVANAUGH: But the broader --

12 MS. HANSFORD: -- that Mr. --

13 JUSTICE KAVANAUGH: Keep going.

14 MS. HANSFORD: -- that Mr. Freed's
15 duties include things that the city council
16 instructs him to do, maybe that's in a memo,
17 maybe that's in an employee manual. I think you
18 can -- you can look at it more or less broadly,
19 but, if there -- if it's unclear and he's doing
20 it on private property, it's not clear whether
21 it's a duty, you should be really careful before
22 assuming --

23 JUSTICE KAVANAUGH: The -- the
24 broader --

25 MS. HANSFORD: -- that it's a duty.

1 JUSTICE KAVANAUGH: -- I don't know
2 that you want us to decide the case based on the
3 specific identified duties in the memo and what
4 have you here as opposed to I think the broader
5 issue is, for a lot of elected and appointed
6 officials, part of their customary duties are to
7 communicate with the public, but that would be
8 from your perspective a mistake, a pretty big
9 mistake to define state action by reference to
10 that customary duty because that would swallow
11 the whole thing?

12 MS. HANSFORD: That's right, Justice
13 Kavanaugh. And I think this Court has already
14 said that in cases like Lane and Garcetti where
15 it warned against overbroad descriptions.

16 So, even if the employee manual and
17 city charter here said your duty is to
18 communicate with the public, it can't be that
19 every time Mr. Freed does it, whether it's at
20 church or at his own house, that is state action
21 that the government can control. That subjects
22 him to viewpoint limitations, which are things
23 that are perfectly appropriate for private
24 individuals to engage in.

25 And we think the kind of odious

1 examples of racial discrimination and the like
2 should be taken care of by the employer being
3 able to regulate private speech under the
4 Pickering balancing test, and so you can ban
5 your professors from saying racially
6 discriminatory things even in their private
7 capacity because it harms their role.

8 But I think it should be -- the Court
9 should be very careful before kind of writing
10 the private social media policies across the
11 board as a constitutional matter, especially
12 with a spillover to --

13 JUSTICE JACKSON: Ms. Hansford, do we
14 have enough in this record to really confidently
15 say that the Facebook page here is private
16 property?

17 So much turns on your argument that
18 there is a distinction between private and
19 public and we can see that clearly in an actual
20 brick-and-mortar scenario.

21 But I didn't understand that either of
22 the courts in the last case and this case really
23 honed in on this issue. And so do we know that
24 a social media account is private in this way?

25 MS. HANSFORD: Justice Jackson, I

1 think the record here is very clear on that, and
2 I think that both of the lower courts looked at
3 it to some extent -- probably pages 24 through
4 26 of the Petition Appendix has a lot of the key
5 facts, but here there is no use of government
6 time. There's no use of government resources.
7 Mr. Freed didn't even use his --

8 JUSTICE JACKSON: But what about the
9 --

10 MS. HANSFORD: -- official devices.

11 JUSTICE JACKSON: -- third-party
12 aspect of this? We know that -- that Facebook
13 itself is -- is operating in this space and
14 doing -- controlling access and that kind of
15 thing. Does that matter to your private
16 analysis?

17 MS. HANSFORD: So that only makes it,
18 if anything, more private, that Facebook also
19 had the authority to take down this account. We
20 don't think that matters on these facts because
21 Facebook didn't actually exercise that
22 authority. The authority that was being
23 exercised was Mr. Freed's ability to block.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 This may be following up a little bit
2 on -- on Justice Jackson's point, but -- and I
3 don't mean to say it any pejorative way to the
4 analysis at all, but I was very surprised in
5 reading the brief to see all the emphasis on
6 private property. I mean, usually, we're told
7 in these, you know, social media, whatever,
8 cases that it's not a question of a physical
9 asset.

10 And in what sense is this really
11 private property? They're -- it's just the
12 gathering of the protons or whatever they are.

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: And they pop
15 up on his page and they could pop up on somebody
16 else's page. So, I mean, is that -- I guess --
17 should I be concerned about the fact that we
18 have this old concept applied to what we always
19 say is some new phenomenon? And I'm not sure
20 that it works in the sense that it's actually --
21 it's not Blackacre. It's -- it's a machine and
22 somebody else's machine can pick it up if you
23 want. It's -- it's -- it seems incongruous to
24 me.

25 MS. HANSFORD: Mr. Chief Justice, the

1 -- this Court has often looked to private
2 property analogies, whether the property is
3 physical or virtual, whether it's access to a
4 public access channel in the Halleck case or the
5 combined federal campaign in Cornelius. What --
6 the question here is a denial of access, and
7 we're trying to figure out if this is an
8 exercise of state power.

9 And -- but you don't need any state
10 power to block somebody on Facebook. This is
11 not a case where you -- it's an officer wearing
12 a uniform flashing a badge and the blocking is
13 somehow more effective before -- because you're
14 an officer. So we think that analogy is fully
15 on point, even though it's virtual, not
16 physical.

17 CHIEF JUSTICE ROBERTS: Thank you.

18 Justice Thomas?

19 JUSTICE THOMAS: Yes. This is
20 probably not relevant in this case, but looming
21 in the background is the power of Facebook
22 itself to block these accounts. And what's
23 curious to me is that there's that elephant in
24 the room and we don't discuss -- we decline to
25 discuss it in the context of private property,

1 your -- your approach.

2 Is there any role for consideration of
3 the fact that Facebook could also influence
4 who's blocked and who's not blocked?

5 MS. HANSFORD: Justice Thomas, and I
6 mentioned to Justice Jackson, at most that's an
7 additional reason to not find state action here,
8 but we ultimately don't think that the fact that
9 Facebook also could exercise control is
10 important because this is not a case where
11 Facebook purported to exercise that control.

12 I believe my colleague gave this
13 example in the first argument, but it's like if
14 the government rents a ballroom for an official
15 meeting and then excludes someone from that
16 meeting, that is exercising its governmental
17 authority as an entity that's controlling that
18 ballroom for this period, even if the hotel
19 could say, oh, this whole meeting is too rowdy,
20 we're going to kick everybody out. That may not
21 be state action on the hotel's part at all.

22 And I think that Facebook's role
23 question is a lurking one that we don't need to
24 address here. But here, where -- when the owner
25 of the Facebook page or the controller of the

1 Facebook page is the one that's doing the
2 blocking, I think you can focus on that person's
3 control even if it's not the full bundle of
4 property rights, but just the ability to exclude
5 for the temporary period until Facebook vetoes
6 it or kicks them off entirely.

7 CHIEF JUSTICE ROBERTS: Justice Alito?
8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: It just seems to
10 me that you want a set of strong rules that make
11 nothing state action, really, because you keep
12 saying you can only have authority if the state
13 is providing resources, personnel, time for
14 personnel, whatever. And you're saying it's
15 only a duty if it's written, basically.

16 And you're saying -- you're giving in
17 a little bit to a strong social norm, but I
18 don't even know what a strong social norm is
19 because a lot of situations, especially in the
20 workplace, can't be described that way.

21 Give me -- let's give you an example.
22 Christmastime teachers are authorized to give
23 little gifts to kids. One teacher decides --
24 it's not authorized officially; it's just a
25 norm, okay? And one teacher decides she's not

1 going to give it to one class of kids but to
2 give it to another.

3 Is that a strong social norm? And
4 what built that strong social -- social norm?
5 So where do we take that from the situation that
6 now official government sites exist for
7 everything?

8 MS. HANSFORD: So --

9 JUSTICE SOTOMAYOR: And to share this
10 information that public officials are now
11 including in their personal accounts. So why
12 shouldn't the government official who jumps the
13 gun on a state announcement, uses their website
14 to be the first to announce everything, followed
15 an hour later or a day later but followed later
16 by officials' announcements, why should that
17 person not be viewed as using their state
18 authority to facilitate their activities?
19 They're getting information before everyone
20 else. They're publishing it before everyone
21 else.

22 MS. HANSFORD: So -- so, Justice
23 Sotomayor, on that last question about somebody
24 who preempts the official announcement, those
25 are not the facts here. And I think my friend

1 misstated that, but Petition Appendix page 25a
2 shows that there's nothing in this record --

3 JUSTICE SOTOMAYOR: But your test is
4 not taking care of that. Neither is the Sixth
5 Circuit's test taking care of either of these
6 two situations.

7 MS. HANSFORD: But -- but I think even
8 in the case where you're preempting the
9 announcement that ends up being announced
10 somewhere else, that's also something the
11 government official could do by telling just his
12 friends. Government officials are allowed to
13 talk about things that are the subject matter of
14 their job, and if the employee doesn't want them
15 to do that, that can be something that the
16 employer can regulate. But if they're doing
17 something additional that they're not required
18 to do, and if they're doing it on private time
19 and on private property, we don't want to assume
20 that they're exercising state power.

21 And I think it's because --

22 JUSTICE SOTOMAYOR: Well, that takes
23 away from the Griffin case because a private
24 citizen can choose to make an arrest, so can a
25 deputy choose to make an arrest. What changed

1 it in Griffin was the fact that he was wearing
2 the deputy badge and purporting to act as a
3 government official.

4 Similarly here, he's disclosing
5 information that's private to his job and using
6 the site to make people realize or believe that
7 he is performing a social function by being the
8 first to give them the news.

9 MS. HANSFORD: So, Justice Sotomayor,
10 when you're conducting an arrest or ordering
11 somebody to leave, exercising governmental
12 authority and appearing to be exercising
13 governmental authority changes the nature of
14 what you're doing. It's giving you additional
15 power that a private rent-a-cop does not have to
16 obtain compliance.

17 And so we think the analogy to the
18 Griffin case would be if Mr. Freed went on
19 Facebook and said, by the authority of city
20 manager, I hereby order everybody to stay at
21 home under penalty of fines, and then the fact
22 that he appeared official and that -- that might
23 matter. But that is not any of the facts here,
24 and that is not the power that is being
25 exercised by blocking someone.

1 Just talking about things, as Your
2 Honor's opinion in Lane makes clear, talking
3 about your job is not something that the state
4 has a monopoly on and that government employees
5 can only do in their official capacity. That's
6 what makes these cases hard, and that's why we
7 need to figure out if the official was speaking
8 as a private citizen or not. And we think that
9 if it's happening on private property on private
10 time, you -- you should be really careful,
11 without a more specific duty, to infer that.

12 But just the -- one last point, the
13 duty doesn't need to be spelled out in minute
14 detail. In your case about the teacher, the
15 teacher's job in the classroom is to teach and
16 mentor her students. And if she's doing those
17 things in a classroom, the fact that handing out
18 gifts is not specifically delineated I don't
19 think is going to make a difference.

20 I think that's also a probably true of
21 Justice Kagan's example of the road closures.
22 If the duty is to provide information in
23 emergency situations, the fact that it doesn't
24 say provide information about road closures as a
25 specific thing doesn't matter. The means don't

1 need to be spelled out. It's still part of the
2 duty.

3 But if it's just general speaking
4 about the pandemic, before you take that away
5 from a public official as a private citizen, you
6 want to be really care -- really sure it's part
7 of his job by looking at something more
8 specific. And we just don't have that here.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAGAN: Ms. Hansford, take
11 this as another version of the Chief Justice's
12 question about the apparent -- let's call it
13 archaic nature of your -- your test. And I
14 guess what strikes me about it is that, you
15 know, it's hard to predict the future, but
16 change has happened very quickly in the last
17 however many years and is going to continue to
18 happen.

19 And part of that change is that more
20 and more of our government operates on social
21 media. More and more of our democracy operates
22 on social media. Public discourse, this is the
23 forum for officials to talk to citizens, for
24 citizens to talk to officials, for citizens to
25 talk to each other, and it is becoming

1 increasingly so.

2 And I worry that the rules that you're
3 suggesting and even the analogies that you're
4 proposing as though we can satisfy our -- our --
5 as we can -- we can solve this case by thinking
6 about grocery stores is really not taking into
7 account the big picture of how much is going to
8 be happening in this forum and how much citizens
9 will be foreclosed from participating in our
10 democracy if the kind of rule you're advocating
11 goes into effect.

12 So I guess I would like you to comment
13 on that. You know, it's a big picture challenge
14 about the nature of the world we live in and
15 we're going to live in. And the need for rules
16 that are going to meet a world that we don't
17 really have any idea what it will look like.

18 MS. HANSFORD: Justice Kagan, I agree
19 that social media is important and is increasing
20 in importance but I think our test is malleable
21 enough to capture that because I think that
22 precisely because social media is so important,
23 it is now a duty of many officials as one of
24 their jobs to run an official social media
25 account or to have a social media presence or to

1 engage in conversations on social media. And as
2 the duties change, then I think that will become
3 state action.

4 But I -- our -- our submission is that
5 in a case where running the Facebook account is
6 extra or in this case when somebody is running a
7 personal Facebook account and happens to talk
8 about topics that matter to his employer, as
9 well as to his community and to him personally,
10 that's not enough.

11 And I think one way to see that this
12 is an extra bucket as opposed to a duty bucket
13 is that Mr. Freed was able to just take down his
14 Facebook page when he was upset at being subject
15 to these private capacity suits. He was able
16 just to take it down. That's just less speech.

17 And if this were a part of his duty,
18 if the mayor said no, no, we really need you to
19 have a Facebook presence, Facebook is critical
20 for the city to communicate with the government,
21 he wouldn't have been allowed to do that but
22 then he would have been running the Facebook
23 page in his official capacity. It would have
24 been a duty because it would have been something
25 he was instructed to do by the mayor.

1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 Justice Kavanaugh?

5 Justice Barrett?

6 Justice Jackson?

7 JUSTICE JACKSON: I will just ask you
8 one last thing, which is I'm trying to
9 understand how we evaluate a government employee
10 controlling access to private property.

11 You keep focusing on the private
12 property nature of this, but what if we have,
13 you know, a big concert, Taylor Swift has a big
14 concert in a private, you know, area, a park or
15 something, and the police recognize there are
16 going to be large crowds, et cetera, and so they
17 come and they help with the screening of the
18 bags and they, you know, kick out people who are
19 rowdy and they are controlling access to this
20 area of the private area of this.

21 Because it's private, we would say
22 that's not state action or --

23 MS. HANSFORD: I -- I -- I don't think
24 so, Justice Jackson. I think those officers
25 would be carrying out their official duties and

1 they would be exercising their power and, of
2 course, it's a police officer case where the
3 authority of the state makes the expulsion more
4 effective, that's why a police officer is hired
5 --

6 JUSTICE JACKSON: But a -- but a --

7 MS. HANSFORD: -- instead of a private
8 security guard.

9 JUSTICE JACKSON: -- but -- but Taylor
10 Swift could have hired -- it's -- it's not just
11 the fact that -- I mean, they're not doing
12 anything more than a private security guard
13 could have done, right? So it's not -- it's not
14 just we look at, well, what are they doing
15 versus what a private person could do.

16 So what makes it that they are state
17 action and not --

18 MS. HANSFORD: I -- I think that state
19 officials can exclude people from private
20 property, but -- and that is the case that if
21 state officials are carrying out their duty to
22 do it, if they were -- if they were hired to do
23 it, that that would --

24 JUSTICE JACKSON: That would --

25 MS. HANSFORD: -- that would --

1 JUSTICE JACKSON: -- be state action?

2 MS. HANSFORD: -- that would be state
3 action if they were hired as police officers to
4 exercise that power and to make that expulsion
5 more effective. But there's no analogy to that
6 on Facebook because anyone can block equally and
7 saying I block a city manager doesn't make it
8 any more of a block than just hitting block.

9 If we had a world where Facebook
10 didn't have a blocking function, then maybe
11 saying, oh, if you come back to my account and
12 post again, the city will fine you. I'm saying
13 this as city manager, that would be an instance
14 of apparent authority, but we just don't think
15 that plays into the set of cases, which is why
16 we think you can set it aside and just focus on
17 governmental control.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Rebuttal, Mr. Kedem.

22 REBUTTAL ARGUMENT OF ALLON KEDEM

23 ON BEHALF OF THE PETITIONER

24 MR. KEDEM: Thank you, Your Honor.

25 I'd like to start by addressing the

1 test proposed by the United States. I think it
2 has a number of problems, but I'd like to focus
3 on two of them.

4 First of all, the test is all about
5 denial of access to property. But many disputes
6 on social media have nothing to do with access.
7 They have to do with discrimination or other
8 forms of constitutional harm.

9 We gave the example of a teaching
10 assistant at a public university who on Twitter
11 made a number of anti-Semitic comments about
12 students in her class, has nothing to do with
13 access.

14 But it doesn't make sense to have one
15 state action test for access cases online and
16 another state action test for all the other
17 cases, even assuming that we can figure out what
18 denial of access means in the context of all of
19 these different platforms and their various
20 functions.

21 And, second, the test proposed by the
22 United States is an obvious doctrinal mismatch
23 because it relies on cases about the use of
24 private property, which, because it's private
25 property, it has some governmental involvement,

1 but it has to be pretty extraordinary to
2 overcome the very strong default presumption
3 that private property is just not used for state
4 action ever.

5 And for that reason, the government
6 says, essentially, only if you are performing an
7 exclusive public function does it ever count as
8 state action. But, as this Court is very well
9 aware, very few things qualify as exclusive
10 public functions. Even something like providing
11 a public education is not an exclusive public
12 function.

13 And for that reason, under the
14 government's test, public officials could
15 transfer a lot of what they do to private
16 property and thereby escape constitutional
17 scrutiny.

18 I'd like to end by talking about the
19 different values on both sides of the equation
20 because this Court has always been mindful in
21 the state action context about the
22 constitutional values that are at stake.

23 On our side, we're talking about
24 creation of a channel of communication between
25 the public official and their constituents about

1 how they're doing their job. So we're not
2 talking about these one-off posts or fortuitous
3 encounters that are essentially the online
4 equivalent of running into someone at the
5 grocery store. Instead, we're talking about
6 denial of access to the channel altogether.

7 And I think that there are four
8 general values. First of all, we've talked a
9 lot about losing out on access to information.
10 Some information is only going to be available
11 on the private Facebook page of public
12 officials. Sometimes it will only be available
13 at a certain time or in a certain form.
14 Sometimes it will be available somewhere else,
15 but it'll be scattered to the four corners of
16 the Internet.

17 But, second, you lose access to the
18 public official him or herself. There were a
19 number of instances where Mr. Freed would
20 explain a directive that he himself had issued
21 to say it applies not just to people who are
22 about to have their water cut off but to people
23 who have already had their water cut off.
24 That's something you would only know if you were
25 able to interact with him and ask him a question

1 online.

2 The third value, as, Justice Kagan,
3 you were pointing out, this is also a place
4 where members of the town came to talk to one
5 another, and that is part of the give and take
6 of local self-government.

7 And, finally, I think there's a
8 dignitary interest. To the extent that we're
9 not just talking about someone doing this,
10 blocking information, you have the information,
11 but now you don't have it, it also matters that
12 it is the government who is doing it to you.

13 Now we have an example in our brief
14 about a public school teacher who holds an
15 end-of-the-school -- end-of-year party at her
16 own house. So there's no duty, there's no
17 authority being used. She's not using any state
18 funds. But she only invites the white students
19 from her class.

20 We think that would be an obvious
21 constitutional problem. But it's not a problem
22 because of any sort of coercion. It's not a
23 problem because of use of state resources. And
24 it's not really about denial of access to pizza
25 and ice cream.

1 Really, it's a dignitary harm that it
2 is someone from the government treating you in a
3 particular way that you should not be treated.
4 And that's, I think, something that gets lost
5 when you don't take account of the fact that he
6 was holding himself out as the city manager,
7 establishing this channel, talking to citizens
8 in that capacity.

9 There are also First Amendment values
10 on the other side of the equation, and we admit
11 that, although, again, we think they're somewhat
12 limited when we're just talking about the
13 channel that you've established and whether you
14 can block access to that channel, as opposed to
15 control over all of your other posts about dogs
16 or other things like that.

17 I think to a large extent the other
18 side undercuts their own First Amendment
19 argument when they freely admit that the
20 government as employer could basically tell them
21 to do all of the things that we say they should
22 have done in the first place: namely, establish
23 a second Facebook account where they just talk
24 about their job or, at the very least, if you're
25 going to invoke your title, then make clear when

1 you're talking in your personal capacity and
2 make clear when you're talking in your
3 professional capacity.

4 So, to some extent, they're already
5 undercutting their own First Amendment rights.
6 But we do admit that if you establish a channel
7 as a public official purporting to be a public
8 official, you do lose some amount of control and
9 you will be subject to First Amendment scrutiny.
10 A lot of times, you can still block people for
11 various reasons.

12 But we think that as Justice Scalia
13 put it in his concurrence in Doe versus Reed,
14 criticism is traditionally the price that we
15 have been willing to pay for self-government.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 The case is submitted.

20 (Whereupon, at 1:05 p.m., the case in
21 the above-entitled matter was submitted.)

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